MALAYSIAN REPORTS

Lee Lan v Lim Yoon Loy & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04-6-1990
HARUN HASHIM, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
26 SEPTEMBER 1991

Civil Procedure — Appeal from magistrate's court — Extension of time to file notice of appeal — Requirements for filing notice of appeal — Forum for applying for extension of time — Stay of execution pending appeal should not have been granted in the circumstances

In this case, the claim was for vacant possession and this was allowed by the magistrate, Tapah, on 25 January 1984. The defendants appealed. The notice of appeal was filed in the magistrate's court on the same day but was not served on the plaintiff. An application for stay of execution was refused by the magistrate's court but was allowed by the High Court. The magistrate asked the solicitors for the defendants to pay a deposit of $250 towards the costs of the appeal. As this was not paid, the appeal was deemed to be withdrawn. The plaintiff's solicitors then asked the defendants to deliver vacant possession. The defendants applied to the High Court for extension of time to serve the notice of appeal and this was allowed. The plaintiff appealed.

Held, allowing the plaintiff's appeal:

(1) Order 49 r 2(6) of the Subordinate Courts Rules 1980 ('SCR') requires the notice of appeal to be served on the parties affected by the appeal and as this was not done, there was no service of the notice of appeal to bring the appeal into existence.

(2) The notice of appeal must show the date on which it was filed in the court appealed from to show that O 49 r 2(3) of the SCR has been complied with.

(3) The time limited to serve the notice of appeal is 14 days from the date of the judgment in accordance with the 1981 amendment to O 49 r 2 of the SCR.

(4) The proper forum to apply for extension of time is the court appealed from, viz the magistrate's court in this instance. However, the application for extension of time could also be made to the High Court, although the court would discourage such a practice. In this case there was a proper application for extension before the High Court.

(5) The High Court in this case should not have granted the application for a stay of execution pending the hearing of the appeal as there was no appeal pending in 1984 on account of the failure to serve the notice of appeal on the plaintiff.

(6) No sufficient grounds had been shown for the court to grant an extension of time to serve the notice of appeal in the circumstances of this case and the appeal should therefore be allowed.

[Bahasa Malaysia summary

Di dalam kes ini tuntutannya ialah untuk mendapat milikan kosong tanah dan ini telah dibenarkan oleh magistret Tapah pada 25 Januari 1984. Defendan telah membuat rayuan. Notis rayuan telah difail di mahkamah magistret pada hari yang sama, akan tetapi ia tidak disampaikan kepada plaintif. Permohonan penggantungan pelaksanaan telah dibuat dan ditolak oleh mahkamah magistret, akan tetapi telah dibenarkan oleh Mahkamah Tinggi. Magistret telah meminta peguam bagi pihak defendan membayar deposit $250 bagi kos rayuan. Oleh kerana deposit ini tidak dibayar, rayuan itu dianggap ditarik balik. Peguam plaintif telah meminta defendan memberi milikan kosong tanah itu. Defendan kemudiannya memohon ke Mahkamah Tinggi supaya mendapat perlanjutan masa untuk menyampaikan notis rayuan dan ini telah dibenarkan. Plaintif telah membuat rayuan kepada Mahkamah Agung.

Diputuskan, membenarkan rayuan plaintif:

(1) Aturan 49 k 2(6) Kaedah-Kaedah Mahkamah Rendah 1980 ('kaedah-kaedah itu') memerlukan notis rayuan disampaikan kepada pihak-pihak yang terlibat dalam rayuan itu dan oleh kerana ini tidak dilaksanakan, tiada terdapat penyampaian notis rayuan yang mewujudkan rayuan itu.

(2) Notis rayuan hendaklah menunjukkan tarikh bila notis rayuan itu difailkan di mahkamah dari mana rayuan dibuat untuk memastikan bahawa A 49 k 2(3) kaedah-kaedah itu telah dipatuhi.

(3) Masa yang ditetapkan untuk penyampaian notis rayuan ialah 14 hari dari tarikh penghakiman mengikut pindaan yang dibuat pada tahun 1981 kepada A 49 k 2 kaedah-kaedah itu.

(4) Permohonan untuk perlanjutan masa sepatutnya dibuat kepada mahkamah dari mana rayuan dibuat, iaitu mahkamah magistret dalam kes ini. Permohonan untuk perlanjutan masa itu boleh juga dibuat ke Mahkamah Tinggi akan tetapi amalan itu tidak harus digalakkan. Di dalam kes ini permohonan yang sah telah dibuat ke Mahkamah Tinggi.

(5) Mahkamah Tinggi di dalam kes ini tidak seharusnya membenarkan permohonan penggantungan pelaksanaan sementara menanti keputusan rayuan itu oleh kerana tidak ada rayuan yang telah dibuat dalam tahun 1984 kerana kegagalan menyampaikan notis rayuan kepada plaintif.

(6) Tidak ada alasan yang mencukupi yang diberi untuk membolehkan mahkamah memberi perlanjutan masa untuk menyampaikan notis rayuan di dalam keadaan kes ini dan oleh kerana itu rayuan hendaklah dibenarkan.]

Cases referred to

1 *Gurbachan Singh* v *Seagrott & Campbell (No 2)* [1962] MLJ 370 (folld)
2 *Liew Chee Tat* v *Lok Moon & Ors* [1972] 2 MLJ 29 (refd)
3 *New India Assurance Co Ltd* v *Karam Singh* [1972] 2 MLJ 26 (not folld)
4 *Ahmad bin Yahaya & Anor* v *Ahmad bin Sulaiman* [1972] 2 MLJ 109 (refd)
5 *Law Yee Wah & Anor* v *Poh Koh and Sons Realty Sdn Bhd* [1974] 2 MLJ 28 (not folld)
6 *Cheah Teong Tat* v *Ho Gee Seng & Ors* [1975] 2 MLJ 149 (folld)
7 *Haji Mohamed bin Suboh* v *Devadas* [1981] 1 MLJ 136 (folld)

Legislation referred to

Courts of Judicature Act 1964 Schedule item 8
Subordinate Courts Rules 1980 O 3 r 5, O 49 rr 1, 2

Appeal from: Civil Appeal No 5/84 (High Court, Ipoh)

VS Viswanathan for the appellant/plaintiff.
Gurbachan Singh for the respondents/defendants.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): This was a claim for delivery of vacant possession in the magistrate's court at Tapah. The learned magistrate allowed the claim on 25 January 1984. The defendants, being dissatisfied with the decision, appealed to the High Court at Ipoh. The notice of appeal was filed in the magistrate's court on the same day (25 January 1984) but it was not served on the plaintiff.

The defendants then applied to the magistrate for a stay of execution but this was refused on 15 February 1984. The defendants then changed solicitors on 21 May 1984.

On 5 June 1984, the defendants applied to the High Court for a stay of execution of the magistrate's order pending the disposal of the appeal. This was allowed by the High Court on 29 June 1984 after an inter partes hearing.

By a letter dated 12 July 1989, the magistrate asked the solicitors for the defendants to pay a deposit of $250 towards the costs of the appeal. This letter was copied to the plaintiff's solicitors. The defendants' solicitors, by registered letter dated 17 July 1989 to the first defendant, requested him to deposit $250 in court. However, this letter did not reach the first defendant. By letter dated 15 September 1989, the magistrate wrote again to the defendant's solicitors asking them to pay the deposit of $250 plus another $180.40 for costs of preparing the appeal record. The first defendant was not aware of this letter as he was away in Kuala Lumpur until he returned to Tapah in November 1989. By this time, the magistrate had notified the defendants' solicitors that the appeal was deemed to have been withdrawn, having failed to pay into court the sum of $250.

Consequently, the plaintiff's solicitors by letter dated 4 December 1989 to the defendants' solicitors demanded compliance with the judgment of 25 January 1984 within 14 days. The defendants' solicitors then wrote to the defendants by letter dated 14 December 1989 to ask them to deliver vacant possession. Upon receipt of that letter on 18 December 1989, the first defendant immediately deposited $250 with his solicitors.

The defendants then on 23 January 1990 applied to the High Court for extension of time to serve the notice of appeal on the plaintiff. The learned judge allowed the application on 2 February 1990. Hence this appeal by the plaintiff.

This appeal raises several procedural issues.

Mode of service

It was contended that the inclusion of a copy of the notice of appeal in the application to the High Court for stay of execution of the magistrate's order of 25 January 1984 and served on the respondents on 20 June 1984 is deemed good service on the respondents. We think not. Order 49 r 2(6) of the Subordinate Courts Rules 1980 ('SCR') provides that 'the notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors'. In the instant case, what was served on 20 June 1984 was the originating motion under the provisions of the Rules of the High Court 1980 ('RHC'). There was accordingly no service of the notice of appeal under O 49 of the SCR to bring an appeal into existence: *Gurbachan Singh* v *Seagrott & Campbell (No 2)*.[1]

What to serve: Order 49 r 2(3) of the SCR provides that the notice of appeal shall be *filed* within 14 days from the day on which the decision was pronounced. It follows that the notice of appeal to be served on the respondent under SCR O 49 r 2(6) must show the date on which the notice of appeal was filed in the court appealed from. This will show the respondent that O 49 r 2(3) of the SCR has been complied with.

When to serve: It was contended that under the SCR, no time limit has been prescribed and therefore the notice of appeal can be served on the respondents at any time. There is a historical background for this contention.

The Subordinate Courts Rules 1950 provided:

Order XXXIX

r 2(3) The notice of appeal shall be intituled and filed in the proceedings in which the decision appealed from was pronounced, and shall be filed within fourteen days from the day on which such decision was pronounced.

r 2(4) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their solicitors respectively. It shall not be necessary to serve parties not so affected.

The 1950 rules were amended in 1955 to read:

r 2(3) The notice of appeal shall be filed within 14 days from the day on which such decision was pronounced. ...

r 2(6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve the parties not so affected.

Rule 2(6) was considered by the courts in the following cases: in *Liew Chee Tat* v *Lok Moon & Ors*,[2] the notice of appeal was filed within three days of the decision but was served on the respondent one month and seven days after the last day prescribed for filing it in court. It was there held in the High Court that although no time limit is prescribed to serve the notice of appeal on the respondents, it had to be served within 14 days thus reversing an earlier decision of the same learned judge in *New India Assurance Co Ltd* v *Karam Singh*[3] where he

had held that service on the respondent 14 days after the time limited to file the appeal was good service because it had been served within a reasonable period of time.

In *Ahmad bin Yahaya & Anor* v *Ahmad bin Sulaiman*,[4] it was held in the High Court that although sub-r (6) does not expressly provide a time limit to serve the notice of appeal on the respondent, it is part of r 2 which has to be complied with before the court is bound to prepare the appeal records under r 3 and therefore the notice of appeal has to be served on the respondent within 14 days.

In *Law Yee Wah & Anor* v *Poh Koh and Sons Realty Sdn Bhd*,[5] the High Court held that it was open to the appellant to serve the notice of appeal on the respondent within a reasonable time and therefore service of the notice 25 days after the 14-day period was sufficiently speedy and that an application for an extension of time for such service was unnecessary.

In *Cheah Teong Tat* v *Ho Gee Seng & Ors*,[6] the appellant had filed the notice of appeal in time but did not serve a copy of such notice on the respondents or their solicitors. The appellant subsequently applied for extension of time to serve the notice of appeal but this was dismissed in the High Court. On appeal, the Federal Court considered *Liew Chee Tat*;[2] *Ahmad bin Yahaya*;[4] *Law Yee Wah*[5] and other cases and at p 151 held:

> In my judgment, r 2(6) of O 39 should not be read in isolation but in conjunction with r 2(3). It must also be read together with Form 39 as prescribed by r 2(1), which, as I have pointed out, is addressed to the court appealed from and the respondent or respondents. Sub-rules (1), (3) and (6) of r 2 of O 39, when read together, provide that an appeal from the decision of a subordinate court must be brought by way of a notice of an appeal in Form 39, which must be filed in that court within 14 days from the day on which the decision was pronounced and served on all the parties affected by the appeal or their respective solicitors. I do not think an appeal can come into existence without the notice of appeal being filed in court, as well as a copy of it being served on the respondent within the prescribed period. I agree that the two acts cannot be done simultaneously, but I am of the opinion that they must be done within the same period.

The 1950 rules were repealed and replaced by the Subordinate Courts Rules 1980 which provide:

O 49 r 1(5)	The notice of appeal must be served on all parties to the proceedings who are directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal.
r 2	Every notice of appeal must be filed and served under rule 1(5) within 14 days calculated from the date on which the judgment or order of the Court was given or made.

This rule was amended on 1 April 1981 to read:

> r 2(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140.
>
> ...
>
> (3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced.
>
> ...
>
> (6) The notice of appeal shall be served by the appellant on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The rule was again amended in 1987 to read:

> r 2(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.

The rule at present in force was amended in 1991 to read:

> r 2(6) The notice of appeal shall be served by the appellant *within the time limited for the filing of appeal* on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected. (Emphasis added.)

The 1991 amendment has now put the position beyond dispute. The correct procedure then is this —

(a) first, file the notice of appeal in the court appealed from within 14 days from date of the decision;
(b) next, serve a copy of the notice of appeal showing the date on which it was filed in court, on the respondent or his solicitor, also within 14 days from date of the decision.

For the purposes of the present appeal the relevant rule applicable at the material time is the 1981 amendment, which in effect repeats r 2(6) of the 1950 rules as amended in 1955. It follows that the Federal Court decision in *Cheah Teong Tat*[6] is the authority by which the courts below are bound. With respect, we are in entire agreement with that decision. The time limited to serve the notice of appeal on the respondents in the instant appeal therefore is 14 days from 25 January 1984.

Extension of time

Where to apply: In the instant case, the application for extension of time to serve the notice of appeal was made to the High Court. It was contended that the application should first be made to the magistrate's court. We agree.

SCR O 3 r 5 provides:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by

any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

As the time prescribed for filing and service of the notice of appeal 'is required or authorised *by these rules*', ie SCR O 49, it follows that the proper forum to apply for extension of time is the court appealed from, viz the magistrate's court in this instance. We would pause to observe, particularly as between solicitors, in the interests of their clients, time and costs that resort should be made to sub-r (3) as *standard practice* if the omission to file or serve is within a reasonable period of time, or where the circumstances are such that it would not prejudice the other party or to prevent injustice.

We are of the view, however, that the application for extension of time, could also be properly made to the High Court as the High Court has the power, not under RHC O 3 r 5 because that provision is limited to matters prescribed by the RHC (and the time prescribed to serve a notice of appeal from a magistrate's court arises under the SCR) but under item 8 of the Schedule to the Courts of Judicature Act 1964. We would, nonetheless, discourage such a practice because of the higher costs in the High Court and unnecessary clogging of the High Court calendar. Be that as it may, there was accordingly a proper application before the High Court in this instance.

Grant of extension: The grant of extension of time is discretionary to be exercised by the judge in each particular case. In the instant case, the learned judge took into account the following matters as appear in his judgment:

(a) the notice of appeal against the decision of the Tapah magistrate on 25 January 1984 had been filed on the same day;

(b) both the Tapah magistrate and the Ipoh High Court had informed the parties of the appeal on 29 January and 28 February 1984 respectively;

(c) there had been two applications for stay of execution pending the appeal before the Tapah magistrate on 15 February 1984 when it was refused and before the Ipoh High Court on 29 June 1984 when it was allowed;

(d) the respondent was aware of the appeal all along and had made no objections to the fact that the notice had not been served on her or her solicitors even at the arguments for the stay on both occasions.

The defendants were represented by solicitors throughout these proceedings right from the magistrate's court.

The failure to serve a copy of the notice of appeal on the plaintiff was obviously a mistake of the defendants' then solicitors. Instead of rectifying the mistake, the defendants changed solicitors. The subsequent solicitors did not apply for extension of time to serve the notice until nearly six years after the event and that too after it was raised by the plaintiff's solicitors. Indeed this omission had been overlooked by everyone concerned. If that had not been so, the High Court would not have granted the stay pending the hearing of the appeal because in law there was no appeal pending in 1984 for the simple reason that no appeal had come into existence then on account of the failure to serve the notice of appeal on the plaintiff. On this ground, the application for stay should have been refused.

It has not been shown that there are merits in the appeal. Finally, there is no explanation why the first defendant had lost touch with Tapah for four years when he was only in Kuala Lumpur but immediately sprang to life when his solicitors advised him that he had to deliver vacant possession within 14 days. We are therefore of the view that there are no sufficient grounds for the court to grant an extension of time to serve the notice of appeal in the circumstances of this case: see *Haji Mohamed bin Suboh* v *Devadas*.[7]

For the reasons stated, we allow the appeal with costs here and below. The order of the High Court is set aside. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Kean Chye & Sivalingam; Bachan & Kartar.*

Reported by *Prof Ahmad Ibrahim*